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09/923,702	08/07/2001	Fumitake Yodo		1747

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Jay H. Maioli
Cooper & Dunham
1185 Avenue of the Americas
New York, NY 10036

EXAMINER

FISCHER, ANDREW J

ART UNIT	PAPER NUMBER
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3627

DATE MAILED: 10/15/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/923,702

Applicant(s)

YODO, FUMITAKE

Examiner

Andrew J. Fischer

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on 04 August 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 9 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 9 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

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DETAILED ACTION

Acknowledgments

1. The amendment filed August 4, 2003 (Paper No. 12) is acknowledged. Accordingly, claim 9 remains the only claim pending.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States. . . .

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the Applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the Applicant for patent.

3. Claim 9 is rejected under 35 U.S.C. 102(e) as being anticipated by Peterson, Jr. (U.S. 5,857,020) ("Peterson"). Peterson discloses an accounting system having accounting center (16) and a terminal device (70, 98, and 86). The terminal device comprising: a first memory (within card 88, e.g. memory 91); a second memory (within medium 70, e.g. 79); a first controller (86 and 94 within 86); the controller updates the attributes of the distributed information to an unavailable state (e.g. when the expiration time expires, the desired content again becomes unavailable); the controller updates the accounting points stored in the first memory based upon the distributed

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information (the change in points is a function of the cost of the content accessed); when accounting points are updated correctly; the controller updates attributes of the distributed information from an unavailable state to the available state (i.e. the user can access the desired information and the charge for that access is deducted); and a second controller (modem). The accounting center comprises a third controller (the personal computer ("PC")) adapted to carry out an account processing (updating a user's account such as purchasing more points, inquiring into the number of points available, or receiving points for returned items, etc.) based upon the accounting points transmitted from the terminal device.

4. Claim 9, as understood by the Examiner, is alternatively rejected under 35 U.S.C. 102(a) as being anticipated by Peterson. See the analysis above.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claim 9 is alternatively rejected under 35 U.S.C. 103(a) as being unpatentable over Peterson.¹ It is the Examiner principle position that claim 9 is anticipated because of the

¹ See MPEP §2112 expressly authorizing alternative §102/§103 rejections when the question of inherency is present in the anticipation rejection.

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inherencies involving the functional language (e.g. "a third controller adapted to carry out an other accounting processing"). However if not inherent, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Peterson to include direct disclosure of the accounting center computer receiving payment (such as via credit card). Such a modification would have merely disclosed what is already inherent in Peterson. Moreover, the modification would have provided further details of the "automatic online process" which is old and well known in this art. This would have made a manual process of updating the accounting information cheaper since a human would not be needed to processes the order.

Applicant is also reminded that providing an automatic means to replace a manual activity which accomplishes the same result is not sufficient to distinguish the claimed invention over the prior art in terms of patentability. *In re Venner*, 262 F.2d 91, 95, 120 USPQ 93, 94 (CCPA 1958). See MPEP §2144.04 III and e.g. Brown (U.S. 5,875,435) as evidence that automating an accounting system is old and well known in the art.

7. Functional recitation(s) using the word "adapted to" and "for" (e.g. "adapted to store" as recited in claim 9) have been given little patentable weight because they fail to add any structural limitations and are thereby regarded as intended use language.² A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art

² See e.g. *In re Gulack*, 703 F.2d 1381, 217 USPQ 401, 404 (Fed. Cir. 1983)(stating that although all limitations must be considered, not all limitations are entitled to patentable weight.).

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structure is capable of performing the intended use, then it meets the claim. *In re Casey*, 152 USPQ 235 (CCPA 1967); *In re Otto*, 136 USPQ 458, 459 (CCPA 1963).

8. If Applicant intends to give the phrase more patentable weight, the Examiner suggests removing “for”, “formed to”, and “adapted to” from the claims where intended use is not desired. An exemplary recitation may be “a first memory storing accounting points”

9. For due process purposes, the Examiner again confirms that Applicant has decided not to be his own lexicographer by indicating and defining claim limitations to have meanings other than their ordinary and accustomed meanings. To support this position, the Examiner again notes the following factual findings. First and as noted in the previous Office Actions,³ the Examiner has again carefully reviewed the specification and prosecution history and can not locate any lexicographic definition(s). Second, the Examiner finds that not only has Applicant not pointed to definitional statements in his specification or prosecution history, Applicant has also not pointed to a term or terms in a claim with which to draw in those statements.⁴ Third, after

³ See initial Office Action mailed April 23, 2002, Paper No. 4, Paragraph No. 8 (hereinafter “the Initial Office Action”); the First Final Office Action mailed September 20, 2002, Paper No. 6, Paragraph No. 10 (hereinafter “the First Final Office Action”); and Office Action mailed May 6, 2003, Paper No. 11, Paragraph No. 9 (hereinafter “the Previous Office Action”).

⁴ “In order to overcome this heavy presumption in favor of the ordinary meaning of claim language, it is clear that a party wishing to use statements in the written description to confine or otherwise affect a patent’s scope must, at the very least, point to a term or terms in the claim with which to draw in those statements.” *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989, 50 USPQ2d 1607, 1610 (Fed. Cir. 1999).

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receiving express notice of the Examiner's position that lexicography is *not* invoked,⁵ Applicant has not pointed out the "supposed errors" in the Examiner's position regarding lexicography invocation in accordance with 37 C.F.R. §1.111(b) (i.e. Applicant has not argued lexicography *is* invoked). Forth and to be sure of Applicant's intent, the Examiner also notes that Applicant has declined the Examiner's express invitation⁶ to be his own lexicographer.⁷ Finally, after receiving express notice of the preceding factual findings and conclusions, Applicant's latest response (Paper No. 12) again does not point out the supposed errors in the Examiner's position regarding lexicography invocation in accordance with 37 C.F.R. §1.111(b). Moreover, Applicant's latest response—while fully considered by the Examiner—does not change the Examiner's conclusion that Applicant has decided not to be his own lexicographer. Therefore (and except as noted under 35 U.S.C. §112 6th paragraph below), the heavy presumption in favor of the ordinary and accustom meaning for claim terminology is again confirmed. Accordingly, the claims continue to be interpreted with their "broadest reasonable interpretation," *In re Morris*, 127 F.3d 1048, 1054,

⁵ See again the Initial Office Action, Paragraph No. 8.

⁶ *Id.*

⁷ The Examiner's requirements on this matter were reasonable on at least two separate and independent grounds. First, the Examiner's requirements were simply an express request for clarification of how Applicant intend his claims to be interpreted so that lexicography (or even an *attempt* at lexicography) by Applicant was not inadvertently overlooked by the Examiner. Second, the requirements were reasonable in view of the USPTO's goals of compact prosecution, productivity with particular emphasis on reductions in both pendency and cycle time, and other goals as outlined in the USPTO's The 21st Century Strategic Plan, February 3, 2003 available at www.uspto.gov/web/offices/com/strat21/index.htm (last accessed October 9, 2003).

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44 USPQ2d 1023, 1027 (Fed. Cir. 1997),⁸ and the Examiner continues to rely heavily and extensively on this interpretation.⁹

10. To the extent that the Examiner's interpretations are in dispute with Applicant's interpretations, the Examiner hereby adopts the following definitions—under the broadest reasonable interpretation standard—in all his claim interpretations.¹⁰ Moreover, while the following list is provided in accordance with *In re Morris*, the definitions are a guide to claim terminology since claim terms must be interpreted in context of the surrounding claim language.¹¹ Finally, the list is not intended to be exhaustive in any way:

⁸ See also *In re Bass*, 314 F.3d 575, 577, 65 USPQ2d 1156, 1158 (Fed. Cir. 2002) (“In examining a patent claim, the PTO must apply the broadest reasonable meaning to the claim language, taking into account any definitions presented in the specification. Words in a claim are to be given their ordinary and accustomed meaning unless the inventor chose to be his own lexicographer in the specification.”); MPEP §§ 2111 and 2111.01; and *In re Etter*, 756 F.2d 852, 858, 225 USPQ 1, 5 (Fed. Cir. 1985) (en banc).

⁹ See 37 C.F.R. §1.104(c)(3) which states in part: “the examiner may rely upon admissions by applicant . . . as to *any matter* affecting patentability. . . . [Emphasis added.]”

¹⁰ While most definitions are cited because these terms are found in the claims, the Examiner may have provided additional definition(s) to help interpret words, phrases, or concepts found in the definitions themselves or in the prior art.

¹¹ See e.g. *Brookhill-Wilk 1 LLC v. Intuitive Surgical Inc.*, 334 F.3d 1294, 1300, 67 USPQ2d 1132, 1137 (Fed. Cir. 2003) (abstract dictionary definitions are not alone determinative; “resort must always be made to the surrounding text of the claims in question”).

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- a. **Controller** “A device on which other devices rely for access to a computer subsystem.” Computer Dictionary, 3rd Edition, Microsoft Press, Redmond, WA, 1997.¹²
- b. **Computer**: “Any machine that does three things: accepts structured input, processes it according to prescribed rules, and produces the results as output.” *Id.* **Server**: “2. On the Internet or other network, a computer or program that responds to commands from a client.” *Id.* **Client**: “3. On a local area network or Internet, a computer that accesses shared network resources provided by another computer (called a *server*).” *Id.*
- c. **Information** “2 a . . . (3): FACTS, DATA . . .” Merriam-Webster’s Collegiate Dictionary, 10th Edition, Merriam-Webster Inc., Springfield, M.A., 1997.

35 U.S.C. 112 6th paragraph

11. Because Applicant has deliberately removed all instances of “means for” from the claims and in accordance with the *Supplemental Examination Guidelines for Determining the Applicability of 35 USC 112 6th*¹³, it is the Examiner’s position that Applicant has objectively

¹² Based upon Applicant’s disclosure, the art now of record, and the knowledge of one of ordinary skill in this art, the Examiner’s finds that the *Microsoft Press Computer Dictionary* is an appropriate technical dictionary known to be used by one of ordinary skill in this art. See e.g. *Altiris Inc. v. Symantec Corp.*, 318 F.3d 1363, 1373, 65 USPQ2d 1865, 1872 (Fed. Cir. 2003) where the Federal Circuit used *Microsoft Press Computer Dictionary* (3d ed.) as “a technical dictionary” used to define the term “flag.” See also *In re Barr*, 444 F.2d 588, 170 USPQ 330 (CCPA 1971)(noting that its appropriate to use technical dictionaries in order to ascertain the meaning of a term of art) and MPEP §2173.05(a) titled “New Terminology”.

¹³ Federal Register Vol 65, No 120, June 21, 2000.

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intended not to invoke 35 U.S.C. 112 6th paragraph.¹⁴ Therefore, the Examiner has interpreted the claims so as to NOT invoke 35 U.S.C. 112 6th paragraph.

12. “A system is an apparatus.” *Ex parte Fressola* 27 USPQ2d 1608, 1611 (B.P.A.I. 1993)(citations omitted). Additionally, “[c]laims in apparatus form conventionally fall into the 35 U.S.C. §101 statutory category of a ‘machine.’” *Ex parte Donner*, 53 USPQ2d 1699, 1701 (B.P.A.I. 1999)(unpublished), (Paper No. 34, page 5, issued as U.S. Patent 5,999,907). Therefore, it is the Examiner’s position that Applicant(s)’ system claims are “product,” “apparatus,” or more specifically, “machine” claims.

Response to Arguments

13. Applicant’s arguments filed with Amendment ‘D’ (in Paper No. 12) have been fully considered but they are not persuasive.

14. Applicant argues that “there is no transmission of a request for purchasing accounting points from the terminal device to the account center.”¹⁵ The Examiner respectfully disagrees. Column 9, ~ lines 35-53 in Peterson discusses adjusting funds through “an automatic online process.” In this embodiment, the terminal device must transmit this request.

¹⁴ Note that statements made during prosecution commit the inventor to a particular meaning of a claim term. See e.g. *CVI/Beta Ventures, Inc. v. Tura LP*, 112 F.3d 1146, 1158, 42 USPQ2d 1577, 1585 (Fed. Cir. 1997).

¹⁵ Applicant’s “Remarks” in Paper No. 12, Page 5, ~ lines 10-12.

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15. Applicant also argues that “there is no accounting process performed in the accounting center based on the request for purchasing accounting points transmitted from the terminal device. Again, the Examiner respectfully disagrees. The “automatic online process” performs a myriad of processes to adjust the funds.

16. Regarding Applicant’s assertion that Peterson requires the user to contact the account center, the Examiner agrees to a point. The Examiner notes that the remote device does the actual contacting based upon instructions given by the user. Applicant’s claimed invention also contracts the accounting center based upon instructions from the user. If the user does not make any choices, in both situations, the accounting center is not contacted.

17. Finally, Applicant argues that his claimed subject matter is “formed differently” The Examiner again notes however that he has chosen a *product* claim. Applicant is therefore reminded that in product claims, the method of production is immaterial since it is only the end result that matters. “The patentability of a product does not depend on its method of production.” *In re Bell*, 991 F.3d 781, 785, 26 USPQ2d 1529, 1532 (Fed. Cir. 1993) citing *In re Thorpe*, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985).

Conclusion

18. **THIS ACTION IS MADE FINAL.** See MPEP §706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 C.F.R. §1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

19. The following two (2) citations to the Manual of Patent Examining Procedure ("MPEP") apply to this Office Action: MPEP citations to Chapters 200, 700, 1800, and 2100 are from the MPEP 8th Edition, Rev 1, February 2003. All remaining MPEP citations are from MPEP 8th Edition, August 2001.

20. In accordance with *In re Lee*, 277 F.3d 1338, 1344, 61 USPQ2d 1430, 1434-35 (Fed. Cir. 2002), the Examiner finds that the references How Computers Work Millennium Ed. by Ron White; How Networks Work, Millennium Ed. by Frank J. Derfler et. al.; and How the Internet Works, Millennium Ed. by Preston Gralla are additional evidence of what is basic knowledge or common sense to one of ordinary skill in this art. Each reference is cited in its entirety. Moreover, because these three references are directed towards beginners (see e.g. "User Level Beginning . . ."), because of the references' basic content (which is self-evident upon review of the references), and after further review of both the intrinsic evidence of record and the entire art

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now of record in conjunction with the factors as discussed in MPEP §2141.03, the Examiner finds that these three references are primarily directed towards those of low skill in this art. Because these three references are directed towards those of low skill in this art, the Examiner finds that one of ordinary skill in this art must—at the very least—be aware of the knowledge and information contained within these three references.

21. Because this application is now final, Applicant is reminded of the USPTO's after final practice as discussed in MPEP §714.12 and §714.13 and that entry of amendments after final is *not* a matter of right. "The refusal of an examiner to enter an amendment after final rejection of claims is a matter of discretion." *In re Berger*, 279 F.3d 975, 984, 61 USPQ2d 1523, 1529 (Fed. Cir. 2002) (citations omitted). Furthermore, suggestions or examples of claim language provided by the Examiner are just that—suggestions or examples—and do not constitute a formal requirement mandated by the Examiner. Unless stated otherwise by an express indication that a claim is "allowed," exemplary claim language provided by the Examiner to overcome a particular rejection or to change claim interpretation has *not been addressed* with respect to other aspects of patentability (e.g. §101 patentable subject matter, §112 1st paragraph written description and enablement, §112 2nd paragraph indefiniteness, and §102 and §103 prior art). Therefore, any claim amendment submitted under 37 C.F.R. §1.116 that incorporates an Examiner suggestion or example or simply changes claim interpretation will nevertheless require further consideration and/or search and a patentability determination as noted above.

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22. It is the Examiner's factual determination that all limitations in claim 9 have been considered and are either disclosed or inherent in Peterson as discussed above. Furthermore, the inherent features are established by a preponderance of the evidence. *In re Epstein*, 32 F.3d 1559, 1564, 31 USPQ2d 1817, 1820 (Fed. Cir. 1994) ("Preponderance of the evidence is the standard that must be met by the PTO in making rejections." (citations and quotations omitted)).

23. All factual findings and conclusions of law in this Office Action are based the entire record. Although the Examiner may have singled out various items of evidence (*e.g.* Peterson) and expressly noted its content, the other documents now of record were also considered and applied when making the Examiner's factual findings and conclusions of law (see *e.g.* rejections above based upon Peterson). Moreover, because many of the cannons of claim construction are generally viewed from a person of ordinary skill in the art,¹⁶ the other documents of record not specifically mentioned in the prior art rejection(s) above were nevertheless used in the Examiner's deliberative process to access, *inter alia*, the definiteness of the claims, the level of skill in the art, and ultimately the patentability of the claimed invention.

24. In accordance with the USPTO's goals of customer service, compact prosecution, and reduction of cycle time, the Examiner has made every effort to clarify his position regarding claim interpretation and any rejections or objections in this application. Furthermore, the Examiner has again provided Applicant(s) with notice—for due process purposes—of his position regarding his

¹⁶ See *e.g. Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576, 1 USPQ2d 1081, 1088 (Fed. Cir. 1986)(noting that the definiteness inquiry focuses on whether those skilled in the art would understand the scope of the claim).

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factual determinations and legal conclusions. The Examiner notes and thanks Applicant for his "Remarks" (Paper No. 12 beginning on page 4) traversing the Examiner's positions on various points. If Applicant disagrees with any additional factual determination or legal conclusion made by the Examiner in this Office Action whether expressly stated or implied¹⁷, the Examiner respectfully reminds Applicant to properly traverse the Examiner's position(s) in accordance with 37 C.F.R. §1.111(b) *in his next properly filed response*. By addressing these issues now, matters where the Examiner and Applicant agree can be eliminated allowing the Examiner and Applicant to focus on areas of disagreement (if any) with the goal towards allowance in the shortest possible time. If Applicant has *any* questions regarding the Examiner's positions or has other questions regarding this communication or even previous communications, Applicant is strongly encouraged to contact Examiner Andrew J. Fischer whose telephone number is (703) 305-0292. If attempts to reach the Examiner by telephone are unsuccessful, the examiner's immediate supervisor, Robert Olszewski, can be reached at (703) 308-5183. The fax number for facsimile responses is now (703) 872-9306.



Andrew J. Fischer
Patent Examiner

AJF
October 9, 2003

¹⁷ E.g., if the Examiner rejected a claim under §103 with two references, although not directly stated, it is the Examiner's implied position that the references are analogous art.